United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7161

To be argued by
LEONARD KOERNER
(42104)

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

BOSTON M. CHANCE, LOUIS C. MERCADO, individually on behalf of all others similarly situated,

Plaintiffs-Appellees,

—against—

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK: GERTRUDE E. UNSER, individually and in her capacity as Chairman of the Board of Examiners; JAY E. GREENE, MURRAY ROCKAWITZ and PAUL DENN, individually and in their capacities as members of the Board of Examiners; MURRY BERGTRAUM, individually and in his capacity as President of the Board of Education; ISAIAH E. ROBINSON, JR., individually and in his capacity as Vice-President of the Board of Education; MARY E. MEADE, SEYMOUR P. LACHMAN and JOSEPH MONSERRAT, individually and in their capacities as members of the Board of Education; HARVEY B. SCRIBNER, individually and in his capacity as Chancellor of the City School District of the City of New York; and THEODORE H. LANG, individually and in his capacity as Deputy Superintendent of Schools of the City of New York,

Defendants-Appellants,

—and—

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASCO, AFL-CIO,

Intervenor-Appellant.

BRIEF OF THE APPELLANTS NEW YORK CITY BOARD OF EDUCATION AND THE CHANCELLOR OF THE BOARD OF EDUCATION

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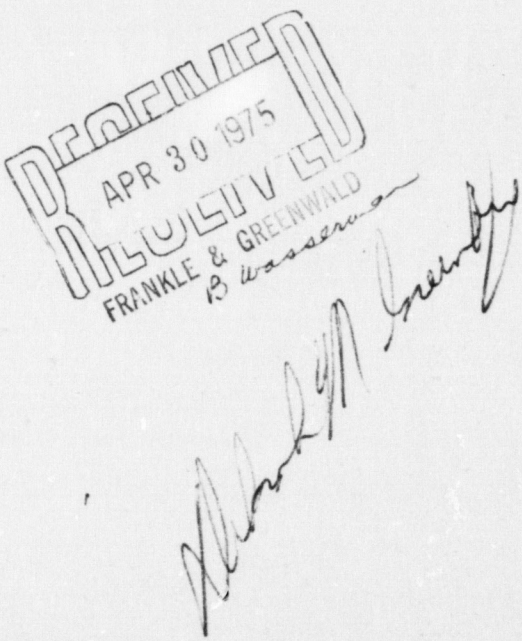
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Statement

The New York City Board of Education and its Chancellor appeal from an order of the United States District Court for the Southern District of New York (TYLER, J.), entered February 7, 1975. That order established a racial quota system to be used by the community school boards and the Board of Education in "excessing" supervisory personnel.

Questions Presented

In prior proceedings in this case, the defendants were restrained from conducting any further examinations for supervisory positions in the New York City school system; from promulgating eligibility lists or issuing licenses on the basis of examinations for supervisory positions; and from making regular or permanent appointments on the basis of any lists previously promulgated pursuant to examinations for supervisory proceedings.

During the proceedings, the plaintiffs and the defendants entered into a stipulation which established an interim procedure for appointments to supervisory positions until the Board of Examiners developed an acceptable examination system. The stipulation was approved by Judge MANSFIELD on May 21, 1973. The order of Judge MANSFIELD approving the stipulation was affirmed by this Court. Pursuant to the stipulation, the Board of Education began appointing eligible candidates to vacant supervisory positions. Any person appointed was, according to the stipulation, to receive a license and be entitled to all the rights and privileges flowing therefrom.

In July, 1974, the Board of Education informed the District Court that it was drafting a plan to revise existing rules and regulations concerning excessing (reduction in number of supervisory personnel as a result of elimination of positions) in all of the schools of the City of New York and that it would seek the Court's approval of such rules consistent with the final judgment to be entered in this case. The proposed rules established methods of determining the amount of seniority accumulated by each of the persons appointed to supervisory positions pursuant to the stipulation approved by the District Court. It was necessary to make such calculations because a state statute and the collective bargaining agreement between the Council of Supervisors and Administrators of the City of New York (hereinafter referred to as CSA), which union represents all supervisors, and the Board of Education establish seniority as the basis for determining which supervisors are to be excessed.

The plaintiffs requested the Court to enjoin the use of seniority as the basis for excessing supervisors, on the ground that a large percentage of the supervisors with the least seniority are members of minority groups.

The District Court granted the plaintiffs' request and established a racial quota system for the purpose of excessing. Pursuant to the District Court's order, supervisors are to be divided into three groups, black, Puerto Rican (also includes Latin American descent) and all other supervisors (other). A community school board which excesses must select supervisors to be excessed in such a manner that the percentage of black, Puerto Rican and other supervisors in the school district before excessing remains the same after excessing.

The excessed supervisors are to be placed on a central list maintained by the Board of Education. The percentages of black, Puerto Rican and other supervisors on the list must then correspond to the percentages of the three groups of supervisors in the entire City of New York. If they don't correspond, the Board must send certain excessed supervisors back to the sending districts until the racial quota has been met. If supervisors are to be excessed out of the entire City school system, the Board has to again excess in such a manner that it does not change the City-wide percentages. The following questions are presented:

1. Did the District Court err in establishing a racial quota system for the purpose of excessing supervisory positions instead of permitting the Board of Education to excess pursuant to a seniority system established by statute and a collection bargaining agreement?

2. Assuming arguendo that the District Court properly ordered the Board of Education to follow a quota system for the purpose of excessing, did the Court abuse its discretion in also requiring each community school district to adhere to a racial quota?

3. Even as to the Board of Education, did the Court abuse its discretion in ordering the Board to maintain a central list of excessed supervisory personnel according to race?

Facts

(1)

Plaintiffs Chance and others, who are black and Puerto Rican, on behalf of themselves and those similarly situated, brought suit against the City school system's Board of Examiners and others under federal civil rights laws, 42 U.S.C. §§ 1981, 1983 (7a-8a).* Plaintiffs claimed that competitive examinations given by the Board of Examiners to those seeking permanent supervisory positions in the City's schools discriminated against blacks and Puerto Ricans and so violated the Equal Protection Clause of the Fourteenth Amendment (18a-19a).

The District Court (MANSFIELD, J.), found sufficient merit in plaintiffs' case to enter a preliminary injunction, enjoining the use of the examinations. The Court wrote two opinions, one dated July 14, 1971 (23a *et seq.;* reported 330 F. Supp. 203), the other, an unpublished memorandum, dated September 17, 1971 (66a-69a). The preliminary injunction order enjoined defendants from conducting further examinations, promulgating eligible lists or issuing licenses and making regular or permanent appointments (70a-71a). It ordered defendants to make all vacant supervisory positions available "on an acting basis" to candidates who satisfied eligibility requirements established by state law and by the City Chancellor and Board of Education, including such eligibility requirements as the

* Numbers followed by "a" refer to pages in the Appellant's Appendix submitted on a prior appeal in this case, Docket #73-2320. Numbers not followed by the letter "a" refer to the Joint Appendix submitted on this appeal. All references not containing any number are to the original papers.

latter Board might thereafter establish "on an interim basis" for acting supervisory personnel without regard to whether such persons presently held "supervisory licenses or regular appointments or assignments" (71a).

An appeal was taken to this Court by the Board of Examiners, not by the Board of Education or by the Chancellor (72a-73a). The Board of Education had not actively opposed the motion for a preliminary injunction, and the Chancellor had not defended against its grant (73a). This Court held that the evidence before the District Court was sufficient to establish a prima facie case of invidious de facto discrimination which had not been justified by the Board of Examiners and which warranted the District Court's issuance of the preliminary injunction. 458 F. 2d 1167 (1972). In its opinion the Court noted that the District Court did not approve of a quota system for the appointment of supervisory personnel and that "he had specifically rejected the idea". 458 F. 2d at p. 1179.

(2)

Extensive settlement talks followed (162a). Pending development of an acceptable examination system, the Board of Education adopted new selection regulations (Special Circular 30, 1972-1973, dated October 25, 1972) as an interim selection procedure (163a). Under that procedure, most supervisory positions were to be filled by acting rather than regularly supervised personnel (*id.*).

On April 2, 1973, counsel for the plaintiff and defendant Board of Examiners submitted a draft of a proposed stipulation of settlement (163a). The proposed stipulation established three pools of persons from which appointments could be made: (1) persons whose names appeared

on the Board of Examiners' lists which had been promulgated, completed but not promulgated, or prepared but not completed; (2) persons who had previously passed or taken a written examination for the supervisory positions under the jurisdiction of the Central Board; and (3) persons who had been or would be appointed on an acting basis pursuant to the interim procedure established by the Board of Education under Circular 30, referred to above (98a-100a). Any person appointed from these three pools was, according to the stipulation, to receive a license and be entitled to all the rights and privileges flowing therefrom (101a).

The Board of Education objected to the proposed stipulation (111a-114a). The Chancellor approved the stipulation (117a-122a).

On May 21, 1973, Judge MANSFIELD rendered a decision approving the stipulation, but only as to those defendants who had approved it (164a-171a). The Court added a provision to the stipulation providing that, within six months of the effective date of the judgment, incorporating the stipulation, the parties "shall either agree to a plan for a permanent system for the selection of supervisors within the New York City School System, or any party shall be free to apply to the Court for a modification of the judgment" (166a).

On July 10, 1973, after a public hearing, Judge MANSFIELD wrote a further memorandum approving the proposed stipulation of settlement (272a). The memorandum noted that the

> "proposed new procedure appears to be based on the principle of merit and fitness, with emphasis on

eligibility standards, parent involvement in selection process, interviews, evaluation of the on-the-job performance, and development of and adherence to other selection criteria" (272a).

On July 12, 1973, Judge MANSFIELD entered an order which modified the order granting a preliminary injunction, which had enjoined the use of various examinations for supervisory positions in City schools. The modification permitted the community school boards or the Board of Education to select and appoint supervisory personnel on a permanent basis (274a-280a). On that same date, Judge MANSFIELD entered a second order constituting a final judgment against the Board of Examiners and the Chancellor, both of whom had joined with the plaintiffs in the stipulation (308a-316a).

The order also denied the motion of a teacher, who has passed some of the challenged examinations, to intervene.

The Board of Education and the teacher each appealed from portions of the order modifying the preliminary injunction. On April 12, 1974, this Court affirmed, 496 F. 2d 820.

(3)

During the pendency of the second appeal to this Court, the plaintiffs moved to have the District Court clarify (1) the orders entered on July 12, 1973, (2) the final judgment against the Board of Examiners and the Chancellor pursuant to their stipulation of settlement and (3) the preliminary injunction entered against all the remaining defendants.

This application sought to determine whether the orders governed not only the initial appointment to supervisory positions of applicants who had never been appointed to fill vacancies in the school system but also the filling of vacancies by transfer and appointment of licensed personnel holding other regular positions. The defendants urged that transfers to existing vacancies should be controlled by the applicable provisions of the collective bargaining agreement. Article IX of the agreement provided that to be eligible for transfers from one school district to another, a supervisory employee must have completed five years or more of continuous service in license in the school from which the transfer was sought. In the case of principals of elementary, intermediate and junior high schools, the transfers were based on seniority.

On December 27, 1973, Judge MANSFIELD held that the provisions of the collective bargaining agreement relating to vacancies were inconsistent with the orders of July 12, 1973, and that the Board was prohibited from preferring licensed personnel over unlicensed personnel who were otherwise qualified for existing vacancies. The Court noted that the purpose of the orders of July 12 was to ensure that "in filling vacancies persons who had acquired or might acquire licenses as a result of the discriminatory testing system would not be given preference over otherwise qualified applicants in the making of appointments" (Opinion p. 9).

A motion by CSA for reargument was denied by Judge TYLER on February 25, 1974.

CSA appealed the two orders to the Court of Appeals (the Board of Education did not appeal). On May 15,

1974, this Court dismissed the appeal without opinion (Docket # 74-1334).

(4)

In July 1974, the Board of Education indicated to the District Court that it was drafting a plan to revise existing rules and regulations concerning the excessing (reassignment or discharge of supervisory personnel when budgetary cut-backs or reorganization require the elimination of positions) of supervisory personnel in all of the schools of the City of New York (29-30). The Board informed the District Court that it would seek the Court's approval of such rules consistent with the final judgment in the case (*id.*).

CSA requested permission to intervene and the New York City School Boards Association requested permission to intervene as *amicus curiae* (11, 27). The District Court granted both applications.

On July 24, 1974, the Board of Education sent the District Court a copy of the proposed excessing rules (35). The rules provided that, for excessing purposes, acting supervisors selected prior to Special Circular 42 (January 17, 1972) who were subsequently licensed and appointed would be considered to have been appointed as of the date of their assignments. Acting supervisors selected pursuant to the procedures established in Special Circular 42 and Special Circular 30 (October 25, 1972) and who were subsequently licensed and appointed would also be considered appointed as of the date of assignment. The people to be excessed would then be determined by their seniority pursuant to the collective bargaining agreement between the Board and CSA (16-17).

On July 30, 1974, Frank Arricale, Executive Director of the Division of Personnel of the Board of Education, submitted an affidavit explaining the effect of the proposed excessing rules for the 1974-1975 school year (90). Excessing is not synonymous with the lay-off of personnel (91). No supervisor had lost a job as a result of excessing in the past 30 to 40 years (90). Mr. Arricale stated that approximately 25 supervisors would be excessed in the 1974-1975 school year (91). It was anticipated that between 200 and 215 supervisors would retire in the 1974-1975 school year. Since the number of supervisors retiring greatly exceeded the number of supervisors to be excessed, it was also anticipated that the excessed supervisors would be assigned to existing supervisory vacancies rather than the excessed supervisors "bumping" less senior supervisors (93).

Mr. Arricale stated that as a result of the Board's policy of placing an excessed supervisor into an existing vacancy, there is a reduction in the racial and ethnic polarization in the composition of supervisory staffs of the various community school districts (94). A community school board has no option as to whom to excess or whom to appoint to a vacancy when an excess situation arises (94). See *Matter of Supervisors and Administrators* v. *Board of Education,* 73 Misc 2d 783 (Sup. Ct., Kings Co., 1973), affd. 42 A D 2d 930 (2d Dept., 1973), affd. 35 N Y 2d 861 (1974).

The plaintiffs opposed the use of excessing rules on the ground that the minority supervisors hired since the original *Chance* case would have the least seniority (46-47).

On July 30, 1974, the District Court (Tyler, J.) issued an order enjoining all the community school boards, the

Board of Education of the City of New York and the Chancellor from any inter-district excessing of supervisory personnel (86-89). The order also required the Board of Education to furnish information concerning the supervisors to be excessed by September 6, 1974 (88).

Mr. Arricale, in an affidavit, stated that under the Board's excessing rules, 35 persons would be in an "excessed situation", 26 from the districts and 9 from the central Board (143). Approximately 15 people would be subject to demotion (143).

Mr. Arricale commented on the plaintiffs' statements that the excessing rules would be discriminatory against black and Puerto Rican supervisors who constitute a large number of the supervisors placed since the initial *Chance* decision of this Court (145). Mr. Arricale noted that the number of black or Puerto Rican controlled school boards was decreasing (145). In addition, as a result of urban renewal, the model cities programs and general decay, most black and Puerto Rican controlled districts are losing students (145). The expanding distiets are in predominantly white districts such as Staten Island and the Riverdale section of the Bronx (145). The excessing rules would protect the large number of new black and Puerto Rican supervisors from demotion by using seniority rules to place excessed minority supervisors in vacancies in expanding districts (145-146).

Peter O'Brien, President of CSA, in an affidavit, stated that the excessing rules proposed by the Board of Education could serve to significantly integrate the supervisory staff district-wide (128). Mr. O'Brien further stated that the removal of "the excessing system, as urged by the plain-

tiffs, a system developed by law and regulation and approved by innumerable state courts would deal New York City public education a death blow" (131-132).

On October 10, 1974, Mr. Arricale, testifying in the District Court, gave his opinion with respect to the various proposals before the Court. He believed that the plaintiffs' proposal to eliminate all excessing rules and rights would be "totally destructive of the school system" (179). The CSA's position, according to Mr. Arricale, was to give excessing rights to all acting supervisors, whether or not such supervisors had been appointed by community school boards and whether or not such supervisors had passed the on-the-job examinations (179-180). Mr. Arricale stated that the Board of Education's position was midway between the two positions. It would give excessing rights to all appointed supervisors (180).

Mr. Arricale noted that excessing is a means of relocation to prevent terminations or demotions (184). He rejected the suggestion that excessed supervisors be placed in a pool operated by the Board of Education which would pay them for a year to give the excessed districts time to find vacancies within their districts. Mr. Arricale called the suggestion wasteful and stated that he should be able to place an excessed supervisor in a vacancy immediately (184-185).

Mr. Arricale concluded by stating that the community school boards, if they intend to excess, must notify the Board of Education by the end of August, 1975 (193).

Between October 10, 1974, and November 22, 1974, the parties submitted to the Court proposed orders in an attempt to resolve the excessing problem. The plaintiffs sug-

gested a racial quota system so that the racial percentage of the supervisors before excessing would be the same as after excessing (234-240, 306-310). The CSA's proposal and the Board of Education's proposal would generally apply the seniority provisions in the collective bargaining agreement between the CSA and the Board of Education to determine who should be excessed (225-230, 241-242, 245, 313-315).

On November 22, 1974, the District Court issued a final order on excessing. The Court accepted the plaintiffs' proposal. The order provided for the establishment of three groups, Group A would consist of blacks; Group B would consist of Puerto Ricans; and Group C would consist of all other supervisors (327-333).

Supervisors would not be included in the three groups if they had been assigned or appointed to a supervisory position for less than five months or if the supervisor did not hold a valid supervisory license on the date he was excessed or he had failed to take or complete the appropriate licensing examination or re-examination after adequate notice (328).

The order provided that each community school board which intended to excess would be required to excess supervisors so that the racial percentage of supervisors in the school district before the excessing would be the same as the racial percentage of supervisors in the district after excessing (330).

The excessed supervisors were to be placed on a list maintained by the Board of Education for the purpose of interdistrict excessing. The Board, after excessing, would be required to maintain the same racial percentage of each group of supervisors throughout the City as existed before the excessing (330).

On January 17, 1975, the Board of Education submitted a new proposed order (362-368). The proposed order would permit a supervisor who was appointed after September 17, 1971, to be entitled to seniority for the purpose of excessing, based "on the mean (midpoint) date of appointment from the list of the examination," given prior to September 17, 1971, "he or she failed provided he or she was eligible for appointment when the list was promulgated" (365).

James Regan, President of the Board of Education, stated, in an affidavit, that the proposed order of the Board would provide compensatory relief for those supervisors who were subjected to examinations found by the courts to be unconstitutional because they were not job related (369-370).

Mr. Regan noted that, under the November 22 order, the plaintiff class was a continuously expanding class and was much larger than "when the suit was started despite the fact that non-discriminatory appointments have been made for almost four years" (370). Mr. Regan further noted that it would be unfair and create many unnecessary problems "in the administration of the public school system of the City of New York" to require the implementation of an order which in effect grants seniority to some individuals which they never could have obtained under a job-related supervisory examination system" (372).

The plaintiffs opposed the Board of Education's motion to resettle the November 22 order on the ground that the racial quota system established in the November 22 order would have the "dual purpose and effect of preventing perpetuation [sic?] of wrongs to the plaintiffs and precluding

resulting resegregation of the school supervisory staff" (377-378).

On February 7, 1975, the District Court issued a final order on the excessing problem (397-407). The order contained the same racial quota system established in the November 22 order. The order modified the November 22, 1974 order in response to certain administrative problems which the Board of Education had represented were involved in the implementation of the November 22 order (398). Intra-district excessing was to be administered by the appointing authority in each community school district. In the original order, the Executive Director for Personnel of the Board of Education participated in the intra-district excessing.

The February 7 order also provided more detail with respect to the establishment of the three pools, black, Puerto Rican and all other supervisors, for the purposes of intra-district and inter-district excessing and reassignment of excessed supervisors to other districts (398-403). The percentages of each group for intra-district excessing were to be based on the total number of supervisors in districts which are in an excess situation (402). The percentages of each group for inter-district excessing is to be based on the total number of supervisors throughout New York City (402). In addition, reassignments can only be made in such a manner that the racial percentages remain the same (403-404).

Opinion Below

At the time the District Court issued its final order on February 7, 1975, it filed an opinion. The Court stated (395-396):

> "In fairness to the parties and counsel, it perhaps should be observed that the undersigned is and has been aware of the relatively recent cases dealing with the issue of fashioning decrees, pursuant to Title VII of the Civil Rights Act of 1964, which protect minorities in lay-off situations. See *Waters* v. *Wisconsin Steel Works, Inc.*, 502 F. 2d 1309 (7th Cir. 1974), and *Jersey Central Power & Light Co.* v. *Electrical Workers Local 327*, [508 F. 2d 687], (3d Cir. decided January 30, 1975). Although counsel here have not briefed these cases or referred to them, I have considered them before filing the so-called final 'excessing' order or decree today.
>
> Arguably, the reasoning of those cases is inapposite here because (1) the facts are somewhat different and (2) this case is not based upon Title VII of the 1964 Act. But it does involve 42 U.S.C. §1981 which has a different legislative history. See *Watkins, infra.* Nonetheless, such reasoning might be said to be generally applicable here. If the latter view were taken, I note my disagreement therewith. Specifically, I believe that the better view in support of the excessing order here is to be found in such recent authorities as *Watkins* v. *United Steelworkers Local 2369*, 369 F. Supp. 1221 (E.D. La., 1974), *appeal docketed*, No. 74-2604 (5th Cir., June 17, 1974). Moreover, I am inclined to think that the Court of Appeals for this circuit has

already adopted a different view of racial quotas under Title VII than that of the Third and Seventh Circuits. See, e.g., *Rios* v. *Enterprise Ass'n Steamfitters Local 638,* 501 F. 2d 622 (2d Cir., 1974). Aside from the fact that I personally find the rationale of this circuit to be more persuasive, this court is bound to follow it in any event."

Applicable Statutes and Provisions of the Collective Bargaining Agreement

TITLE VII OF THE CIVIL RIGHTS ACT

42 U.S.C. § 2000e-2

• • • • •

"Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not de-

signed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29."

McKinney's New York Education Law

Section 2585

"Continuation in office of boards, bureaus, teachers, principals and other employees, et cetera

1. Except as otherwise provided herein the boards, bureaus, teachers, principals, supervisors, superintendents, heads of departments, assistants to principals, examiners, supervisors of lectures, directors and all other officers and employees of the school systems or of boards of education of the several cities of the state, lawfully appointed or assigned before June eighth, nineteen hundred seventeen, shall continue to hold their respective positions for the term for which they were appointed or until removed as provided in subdivision five of section twenty-five hundred twenty-three of this article.

2. If a board of education abolishes an office or position and creates another office or position for the performance of duties similar to those performed in the office or position abolished, the person filling such office or position at the time of its abolishment shall be ap-

pointed to the office or position thus created without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled.

3. Whenever a board of education abolishes a position under this chapter, the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued.

4. In a city having a population of one million or more, no member of the teaching or supervising staff who has been regularly appointed in accordance with merit and fitness, determined by competitive examination, shall be dismissed upon the abolition of his position if:

a. The superintendent of schools, upon the recommendation of the board of examiners, certifies to the board of education that such member is competent to serve in any vacant position in the same rank or level or in a lower rank or level of service with such board; and

b. The superintendent of schools, upon direction of the board of education, assigns such member to any such vacant position, in which event such member so assigned shall serve in such position without reduction of salary.

5. If an office or position is abolished or if it is consolidated with another position without creating a new position, the person filling such position at the time of its abolishment or consolidation shall be placed upon a preferred eligible list of candidates for appointment to a vacancy that then exists or that may there-

after occur in an office or position similar to the one which such person filled without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled. The persons on such preferred list shall be reinstated or appointed to such corresponding or similar positions in the order of their length of service in the system."

Collective Bargaining Agreement Between Board of Education of the City of New York and Council of Supervisors and Administrators of the City of New York

Section L of Article VII of the agreement provides as follows:

"Excessing Rules

The following excessing rules shall be adhered to in all divisions. If a city-wide excess condition causes a layoff of staff in any licensed position, the provisions of law will be followed to determine the staff member to be laid off, without fault and delinquency with the understanding that said member of staff is to be placed on a preferred list. Such excessed staff member shall be the last person appointed in the license on a city-wide basis.

Rule 1. Within the school, district, bureau or other organizational unit, the supervisor with the latest date of appointment within license will be the first to be excessed, irrespective of probationary or permanent license. A supervisor on probation should not be excessed more than once during his probationary period of service.

Rule 2. An intermediate supervisor who has been excessed from a school in a district to another school in the same district may request an opportunity to return to the school from which he has been excessed if within a year a vacancy should occur in his license in that school. Such a request will have priority over any other transfer or appointment to that vacancy.

Rule 3. All leave-of-absence time for which salary credit is granted will not affect the earliest date of appointment for purposes of excessing. All other leave-of-absence time without pay or time lost because of resignation and subsequent reappointment will affect the earliest date of appointment.

Rule 4. Supervisors in excess in a school unit or district office under the jurisdiction of a community board must be placed in vacancies within the district to the fullest degree possible. For school units, districts, or bureaus under the jurisdiction of Central Board, supervisors in excess in a school or bureau must be placed in appropriate vacancies within the district or central office.

Rule 5. To minimize movement of personnel, excessed supervisors may be assigned when no other vacancies exist in the districts, within the district to appropriate openings resulting from leaves of absence without pay.

Rule 6. The Central Board has the responsibility for placing supervisors who are excessed from a school or community district office and cannot be accommodated by their own district, within budgetary limitations and if vacancies exist within the city. Where possible, the wishes of the supervisor will be taken

into account in his placement by the Central Board.

Rule 7. When a supervisory position in Central Headquarters is abolished, the occupant of that position is excessed, and he shall be granted the same rights for placement as a supervisor who is excessed from a community district."

POINT I

The seniority system established by statute and collective bargaining agreement is not racially discriminatory under 42 U.S.C. § 1983. The District Court erred in establishing a racial quota system instead of using the employment seniority system for the purpose of excessing supervisors in the New York City school system.

(1)

The seniority system established by Section 2585 of the New York Education Law and the collective bargaining agreement between the Board of Education of the City of New York and CSA is not racially discriminatory.

The use of an employment seniority system, which provides that the last hired will be the first fired, in discrimination cases for the purpose of determining which employees are to be laid off for economic reasons has been upheld by the Courts of Appeal for the Seventh Circuit in *Waters* v. *Wisconsin Steel Works of Int. Harvester Co.*, 502 F. 2d 1309 (1974), and the Third Circuit in *Jersey Central Power and Light Co.* v. *Local Unions 327, etc. of I.B.E.W.*, 508 F. 2d 687 (1975).

In *Waters,* the plaintiffs, two black journeymen bricklayers, brought an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and Section 1981 of the Civil Rights Act of 1866. Plaintiff Waters, among other things, challenged the existence of Wisconsin Steel's "last hired, first fired" seniority system as being violative of Title VII and Section 1981 because it perpetuated prior discriminatory policies and hiring practices of the defendants. Waters had unsuccessfully sought employment at Wisconsin Steel Works in 1957. He was hired in July 1964 and laid off two months later because of business reasons. In 1967, Waters was recalled, and again laid off two and one half months later because of business reasons.

The District Court held that prior to April 1964, Wisconsin Steel had discriminated in the hiring of bricklayers. The Court found that the seniority system, established in 1946, was violative of 42 U.S.C. 1981 and not a bona fide seniority system under Title VII. The Court held that Wisconsin Steel Works, in laying off plaintiff Waters in September 1964, had violated Waters' civil rights.

On appeal to the Court of Appeals, Wisconsin Steel argued that an employment seniority system which awarded workers credit for the full period of their employment is racially neutral and is a bona fide seniority system within the contemplation of Title VII, 42 U.S.C. § 2000e-2 (h). 502 F. 2d at p. 1317. That section specifically states that it shall not be an unlawful employment practice for an employer to maintain a bona fide seniority and merit system.

The Court of Appeals accepted the defendant's argument, reversed the District Court on the issue of seniority, and found that the plant-wide employment seniority sys-

tem used by Wisconsin Steel Works did not violate Title VII. In so holding, the Court of Appeals reviewed at length the legislative history of Title VII. The Court quoted from the Interpretative Memorandum of Senators Clark and Case, which stated that Title VII would have no effect on established seniority rights. The memorandum stated that an employer "would not be obliged—or indeed permitted * * *" to give recently hired negroes "special seniority rights at the expense of the white workers hired earlier". 502 F. 2d at p. 1318. The Court of Appeals quoted from the Congressional Record an oral response given by Senator Clark to an inquiry by Senator Dirksen as to whether an employer is discriminating if his contract requires that the employee last hired, even if he is the only negro employed, be first fired. Senator Clark responded that, if the negro was last hired, he can be first fired "so long as it is done because of his status as 'last hired' and not because of his race". 502 F. 2d at p. 1318. The Court then quoted at length from an Interpretive Memorandum on Title VII received by Senator Clark from the United States Department of Justice. The memorandum specifically stated that Title VII "would have no effect on seniority rights existing at the time Title VII takes effect." The memorandum noted that, for the purposes of layoffs, the seniority system would be applicable "even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes". 502 F. 2d at p. 1319.

The Court, after reviewing the legislative history, stated (502 F. 2d at pp. 1319-1320):

> "Title VII mandates that workers of every race be treated equally according to their earned seniority.

It does not require as the Fifth Circuit said [Local 189, United Papermakers & Paperworkers v. United States, 416 F. 2d 980 (1969)], that a worker be granted fictional seniority or special privileges because of his race.

Moreover, an employment seniority system is properly distinguished from job or department seniority systems for purposes of Title VII. Under the latter, continuing restrictions on transfer and promotion create unearned or artificial expectations of preference in favor of white workers when compared with black incumbents having an equal or greater length of service. Under the employment seniority system there is equal recognition of employment seniority which preserves only the earned expectations of long-service employees.

Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the 'last hired, first fired' principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences. Griggs v. Duke Power Co., 401 U.S. 424, 430-431, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971)."

The Court, having concluded that the employment seniority system did not violate Title VII, also found that the system did not violate 42 U.S.C. § 1981. 502 F. 2d at p. 1320, fn. 4.

In *Jersey Central Power & Light Co.* v. *Local Unions 327, Etc. of I.B.E.W.*, 508 F. 2d 687 (3rd Cir., 1975), an employer, a large public utility, seeking to reduce its work force for business reasons, brought a declaratory judgment action to determine whether it was required to adhere to collective bargaining agreement provisions requiring layoffs in reverse order of seniority or whether the employer was obligated to implement the provisions of a conciliation agreement made with the Equal Employment Opportunity Commission and retain among its employees a larger proportion of minority group and female workers. The conciliation agreement contained no express seniority provision nor did it expressly modify or alter the seniority provisions found in the collective bargaining agreement. It was agreed among the parties that layoffs in reverse order of seniority would have a disproportionate effect upon minority group and female workers. 508 F. 2d at p. 691.

The Equal Employment Opportunity Commission argued, *inter alia,* that the objectives of the conciliation agreement (to increase the proportion of female and minority group workers) would be defeated if effect was given to the seniority provisions of the collective bargaining agreement. 508 F. 2d at p. 703. The Court of Appeals construed this issue as requiring a determination as to whether the seniority clause "*must* be modified as being contrary to public policy and welfare", (emphasis the court's). 508 F. 2d at p. 704. The Court of Appeals then reviewed at length the legislative history of Title VII, just as had the Seventh Circuit in *Waters. Jersey Central,* 508 F. 2d at pp. 706-709.

After reviewing the legislative history, and other federal cases that have interpreted Title VII, the Court stated (508 F. 2d at p. 710):

> "We thus conclude in light of the legislative history that on balance a facially neutral company-wide seniority system, without more, is a bona fide seniority system and will be sustained even though it may operate to the disadvantage of females and minority groups as a result of past employment practices. If a remedy is to be provided alleviating the effects of past discrimination perpetuated by layoffs in reverse order of seniority, we believe such remedy must be prescribed by the legislature and not by judicial decree."

A District Court in *Watkins* v. *Steel Workers Local 2369,* 369 F. Supp. 1221 (E.D. La., 1974), contrary to *Waters* and *Jersey Power,* has held that company-wide seniority systems may be held to violate Title VII if found to perpetuate the effects of past discrimination. An appeal in *Watkins* was argued on January 20, 1975 [Docket No. 74-2604 (5th Cir.)]. On that same date, the Fifth Circuit heard an appeal in *Dawkins* v. *Nabisco, Inc.,* CCH 7 Employment Practices Decisions, Paragraph 9348 (N.D. Ga., 1973), where the District Court had upheld a plant-wide seniority system]. It is our position that *Watkins* was improperly decided and that the decision there, as is discussed below, improperly fails to distinguish between departmental seniority actually earned and constructive or fictional seniority in a plant-wide seniority system. The *Watkins* decision is, we believe, contrary to the decision of the Fifth Circuit in *Local 189, United Papermakers and Paperworkers* v. *United States,* 416 F. 2d 980, 994-995

(1969), cert. den. 397 U.S. 919 (1970), which was cited by the Court of Appeals in *Waters* in support of its decision, *ante*, p. 26.

In a departmental seniority system, seniority is measured by length of service in a particular department. Where the courts have found that minorities have been restricted to lower paying departments, the courts have permitted the aggrieved individuals to be transferred to the higher paying departments with full recognition to the time actually worked by each of the employees in the lower paying departments. The courts have reasoned that departmental seniority systems are not "bona fide" under 42 U.S.C. 2000e-2(h), since, unless minority employees were given credit for work in lower paying jobs, no minority employee would transfer to the higher paying department and, as a result, any court ordered remedy to correct the prior discrimination would be ineffective. See *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (2d Cir., 1971); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir., 1971) pet. for cert. dism. 404 U.S. 1006 (1972); *United States* v. *Chesapeake and Ohio Railway Co.*, 471 F. 2d 582 (4th Cir., 1972), cert. den. sub nom. *Locals 268 and 1130 of Brotherhood of Railroad Trainmen* v. *United States*, 411 U.S. 939 (1973); *United States* v. *Hayes International Corp.*, 456 F. 2d 112 (5th Cir., 1972); *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F. 2d 980 (5th Cir., 1919), *cert. den.* 397 U.S. 919 (1970); *United States* v. *Jacksonville Terminal Company*, 451 F. 2d 418 (5th Cir., 1971); *Bing* v. *Roadway Express*, 485 F. 2d 441 (5th Cir., 1973); *Pettway* v. *American Cast Iron Pipe Company*, 494 F. 2d 211 (5th Cir., 1974); *United States* v. *N.L. Industries*, 479 F. 2d 354 (8th Cir., 1973); *Quarles* v. *Philip Morris, Inc.*,

279 F. Supp. 505 (E.D. Va., 1968). See also, *Heard* v. *Mueller,* 464 F. 2d 190 (6th Cir., 1972). Cf. *Franks* v. *Bowman Transportation Co.,* 495 F. 2d 398 (5th Cir., 1974), cert. granted 43 U.S.L.W. 3510, March 25, 1975 (plaintiffs requested the Court to grant retroactive seniority to the time when individual plaintiffs had applied for jobs with the company but were rejected for discriminatory reasons); *Meadows* v. *Ford Motor Company,* 510 F. 2d 939 (6th Cir., 1975) (Court of Appeals reversed and remanded to District Court for new hearing as to whether individual plaintiffs are entitled to retroactive job seniority for the period that the hiring of those individuals was delayed because of discriminatory practices).

In three of the departmental seniority cases cited above, the courts, in construing Title VII's legislative history, have distinguished between giving individual plaintiffs credit for seniority *actually* earned and giving all minority employees fictional seniority, for the purpose of layoffs, in an employment seniority situation such as is involved in the instant case.

In *United States* v. *Bethlehem Steel,* this Court, in commenting on the memorandum on Title VII submitted by Senators Clark and Case, discussed *ante* p. 25, which stated that blacks were not to be given special seniority rights at the expense of white members hired earlier, stated (446 F. 2d at p. 661):

> "That memorandum, however, in focusing on formerly white-only plants, seems to say at most that the seniority of a white on the job will not be affected by the claims of blacks hired after he was. As we make clear below in discussing the precise relief to which we believe the government is entitled, the discriminatorily assigned employees who transfer will not re-

> ceive 'special seniority rights' or 'super seniority'. Their seniority rights will be no greater than that awarded more fortunate employees. Both groups will bid against each other for vacancies on the basis of plant-wide seniority; an earlier hired white employee will have greater seniority than a later hired black."

In *Local 189, United Papermakers and Paperworkers* v. *United States,* the Court of Appeals for the Fifth Circuit, in commenting on 42 U.S.C. 2000e-2(h), which section preserved the bona fide seniority system, stated (416 F. 2d at pp. 994-995):

> "No doubt, Congress, to prevent 'reverse discrimination' meant to protect certain seniority rights that could not have existed but for previous racial discrimination. For example a Negro who had been rejected by an employer on racial grounds before passage of the Act [Title VII] could not, after being hired, claim to outrank whites who had been hired before him but after his original rejection, even though the Negro might have had senior status but for the past discrimination."

In *Quarles* v. *Philip Morris, Inc.,* the District Court, after reviewing the legislative history of Title VII, stated (279 F. Supp. at 516):

> "Several facts are evident from the legislative history. First, it contains no express statement about departmental seniority. Nearly all of the references are clearly to employment seniority. None of the excerpts upon which the company and the union rely suggests that as a result of past discrimination a Negro

> is to have employment opportunities inferior to those of a white person who has less employment seniority. Second, the legislative history indicates that a discriminatory seniority system established before the act cannot be held lawful under the act. The history leads the court to conclude that Congress did not intend to require 'reverse discrimination'; that is, the act does not require that Negroes be preferred over white employees who possess employment seniority. It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."

Later in the opinion, the Court, in evaluating the proposals of the parties as to an appropriate remedy, stated (279 F. Supp. at p. 519):

> "Additionally the plaintiffs' proposal, while not ousting white employees from present jobs, would prefer Negroes even though they might have less employment seniority than whites. Nothing in the act [Title VII] indicates this result was intended."

See also, *United States* v. *Chesapeake and Ohio,* 471 F. 2d 582, 588 (4th Cir., 1972), cert. den., sub nom., *Locals 268 and 1130 of Brotherhood of Railroad Trainmen* v. *United States,* 411 U.S. 839 (1973) *ante,* p. 29 (Court of Appeals found part of relief granted by District Court to be too broad because relief included two classes of employees hired after effective date of Act [Title VII] who were not victims of discrimination).

The decisions of the Courts of Appeal in *Waters* and *Jersey Power,* preserving employment seniority systems

for the purpose of determining layoffs after non-discriminatory hiring procedures have been established, are consistent with prior decisions of the Courts of Appeal, including this Court, which have construed the legislative history of Title VII. We believe they are persuasive authority and should be followed by this Court in the instant case.

(2)

In addition to being supported by precedent, we submit that the preservation of the employment seniority system is supported by strong public policy considerations. A provision regarding seniority is contained in a large number of collective bargaining agreements in the United States. NOTE, *Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 Harvard Law Review 1109, 1159 (1971). Seniority is very important to the worker, "determining his competitive status and potentially providing him with considerable job security" (*id.*). Seniority acts as an incentive for an employee to remain with one employer. The seniority system provides an employer with a neutral method of determining which employees are to be laid off for business reasons. To require a quota system, for the purpose of excessing, as was ordered by the District Court in the instant case, will affect the morale of the employees and heighten tension among the employees in each of the three pools.

It is not disputed that the preservation of an employment seniority system, if there are layoffs, will have a greater effect on the minority employees who have been recently hired to compensate for the effects of past discrimination. With respect to these competing legitimate interests, it is

submitted that the use of an employment seniority system to determine layoffs maintains a proper balance. The Courts, through hiring quotas and promotion (involving departmental seniority) without regard to seniority, can give minorities adequate preferential treatment to compensate them for past discrimination.

Title VII recognizes the difficult problem of reconciling the need for preferential treatment and the need to preserve a plant-wide seniority system in Section 2000e-2(h), which preserves bona fide seniority systems. If a seniority system, as is involved in the instant case, does not come within the purview of Section 2000e-2(h), that section is rendered meaningless.

It is noteworthy that the decisions of this Court indicate a reluctance to impose hiring quotas except under the most compelling circumstances. See *Patterson* v. *Newspaper and Mail Deliverers Union,* Docket No. 74-2548, 2d Cir., slip op. pp. 2415, 2433 (decision on March 20, 1975) (concurring opinion of Judge FEINBERG); *Rios* v. *Enterprise Ass'n Steamfitters Loc. 638 of U.A.*, 501 F. 2d 622, 634 (2d Cir., 1974) (dissenting opinion of Judge HAYES);* *Bridgeport Guardians Inc.* v. *Members of Bridgeport C.S. Commission,* 482 F. 2d 1333, 1340 (2d Cir., 1973). Cf. *Griggs* v. *Duke Power,* 401 U.S. 424, 430-431 (1971).

In addition to the general policy reasons in support of the preservation of the employment seniority system, the

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* In the instant case, the District Court stated that it felt it was bound by this Court's decision in *Rios* to establish a quota system for the purpose of excessing supervisors (396). *Rios* involved only the use of quotas for *hiring* purposes and presents substantially different issues from the issues involved on this appeal.

facts of the instant case suggest other reasons for allowing application of a seniority system such as appellants have here proposed. The use of a seniority system for the purpose of excessing school personnel is not only established by a collective bargaining agreement but is required by New York State law. Education Law §2585. In addition, it should be noted that the appellant's proposed plan was in fact not based solely on seniority. On January 17, 1975, the Board of Education offered to the District Court a proposed order that, for the purposes of excessing, would give a supervisor, who had taken and failed to pass an examination found by the Courts to have been non-job related, seniority as though he had passed and had been appointed (362-368). Thus, the Board's proposal to give retroactive seniority to minority plaintiffs actually aggrieved went further than the requirements under existing law. See, *Franks* v. *Bowman Transportation Co.,* 495 F. 2d 398 (5th Cir., 1974), cert. granted 43 U.S.L.W. 3510, March 25, 1975 *ante,* p. 30; *Meadows* v. *Ford Motor Company,* 510 F. 2d 939 (6th Cir., 1974), *ante,* p. 30.

As was pointed out to the court below, under the quota system imposed by the District Court the plaintiff class "is not only a continuously expanding class but also is much larger than when the suit was started despite the fact that non-discriminatory appointments have been made for almost four years" (370). Under the District Court order a supervisor appointed in September 1974, who may have been ineligible to become a supervisor prior to September 1971, would now be part of the plaintiff class (370).

In contrast to the plan imposed by the February 7 order, which, because of the constantly expanding plaintiffs class resulting from that order, protects minority group mem-

bers who haven't been victims of discrimination, the proposal by the Board of Education properly preserves the seniority system and protects all the plaintiffs who may have been aggrieved by the testing procedures of the Board of Examiners prior to the initial *Chance* decision.

(3)

It is anticipated that the plaintiffs will argue that a remedy under §§1981, 1983 is not restricted by the legislative history of Title VII and the Section of Title VII [42 U.S.C. 2000e-2(h)] which preserves bona fide seniority systems. This precise argument was raised in *Waters* v. *Wisconsin Steel Works of Int. Harvester,* 502 F. 2d 1309 (7th Cir., 1974). (App. Reply Brief, pp. 24-25). In *Waters,* the plaintiffs sued under 42 U.S.C. §1981 and under Title VII. In the initial *Waters* decision, 427 F. 2d 476 (1970), the Court of Appeals, in holding that the union local could, under certain circumstances be sued directly in district court without previously being charged before the Equal Employment Opportunity Commission under Title VII, indicated that the two sections should be harmonized, wherever possible. 427 F. 2d at pp. 481, 484-487. On the second appeal, 502 F. 2d 1309, as noted above, *ante,* p. 26, the Court, after concluding that the employment seniority system did not violate Title VII, stated (502 F. 2d at p. 1320, fn. 4):

> "Having passed scrutiny under the substantive requirements of Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of 42 U.S.C. §1981."

In *Howard* v. *Lockheed Georgia Co.,* 372 F. Supp. 854 (N. D. Ga., 1974), the Court refused to allow the plaintiff

to seek compensatory and punitive damages under Section 1981, in addition to back pay, on the ground that such damages are not available under Title VII. In rejecting the plaintiff's contentions, the Court stated, in language particularly applicable to this case (372 F. Supp. at pp. 857-858):

> "Were this Court to allow recovery sought in the instant action under Section 1981, such a conflict [earlier described by the Court as "irreconcilable"] would indubitably be created; for to judicially legislate a concurrent and broader remedy under Section 1981 would invite every plaintiff asserting a claim for racially discriminatory employment practices to ignore the remedy which Congress so carefully constructed in Title VII."

See, also, *Stamps* v. *Detroit Edison,* 43 U.S.L.W. 2396, April 1, 1975 (6th Cir.), reversing in part 365 F. Supp. 87 (E.D. Mich., 1973) (action brought under §1981 and Title VII; Court of Appeals set aside punitive damages on ground such damages are not authorized under Title VII); *Long* v. *Sapp,* 502 F. 2d 34, 39 fn. 2 (5th Cir., 1974).

The Supreme Court has recognized Title VII and §1981 as "parallel and overlapping remedies against discrimination." *Alexander* v. *Gardner-Denver,* 415 U.S. 36, 47 fn. 7 (1974). Plaintiffs, in discrimination cases, as in *Waters* usually assert a cause of action under §§1981 and 1983 and a cause of action under Title VII.* A separate body of sub-

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* For example, in *Rubinos* v. *Board of Examiners,* Docket #74 Civ. 2240 (S.D.N.Y.), the plaintiffs commenced an action under §1983 challenging the examination procedures for teachers in the New York City School system. The original complaint was

stantive law for each statute would create unnecessary confusion in discrimination law and mak. more difficult the proper adjudication of rights. It is urged that Sections 1981 or 1983 cannot be used to invalidate a seniority system preserved under Title VII. The legislative history of Title VII and the specific statutory provision in Title VII approving bona fide seniority systems should be applicable to challenges to the seniority system under Sections 1981 or 1983.

Even if the legislative history of Title VII is found by this court not to be applicable to actions under Sections 1981 or 1983, the reasons discussed above, *ante,* pp. 33-36, in support of the preservation of a racially neutral employment seniority system are applicable to actions brought under these sections and support our argument that the use of a seniority system, instead of a racial quota system, for excessing purposes complies with the requirements of Sections 1981 and 1983.

(4)

It is also anticipated that the plaintiffs will argue that the decision of Judge MANSFIELD, dated December 27, 1973, holding that transfers to existing supervisory vacancies are not subject to the provisions of the collective bargaining agreement, is persuasive authority on the issues raised on this appeal. This argument is without merit. In finding

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amended to include a cause of action under Title VII. There is nothing in any of the papers submitted in the *Rubinos* case which indicates that a remedy not available under Title VII is nevertheless available under §1983. To the contrary, the amended complaint requested the same relief as had been requested in the original complaint. The case is presently on trial.

that the orders of the District Court on July 12, 1973, which established the interim hiring procedure, and the applicable provisions of the collective bargaining agreement were inconsistent, the Court referred only to the provisions dealing with transfers of the supervisors to existing vacancies. The Court determined that it would not follow the provisions of the collective bargaining agreement because the filling of vacancies was part of the selection and appointment process that was covered by the July 12, 1973 orders (opinion, pp. 9, 12). The opinion directed itself to the issue before it and did not address itself to the problem presented by the use of the seniority system, under provisions of the collective bargaining agreement different from the provisions involved on the motion for guidance in the transferring of supervisors to existing vacancies, for the purpose of excessing.

The failure of the Board of Education to appeal that decision of Judge MANSFIELD does not affect our presentation of the issues in this case. The Board is not bound to take a protective appeal on an issue involving transfers to existing vacancies because the decision on that issue might have some relevance in future litigation when the different issue of excessing comes before the courts.

POINT II

Assuming arguendo that the District Court did not err in instituting a racial quota system, the Court abused its discretion in requiring each community school district to adhere to racial quotas as well as requiring the Board of Education to adhere to racial quotas in excessing supervisors.

(1)

The appropriate remedy in a discrimination case is the most moderate form of a remedy which will rectify the effects of past discriminatory practices. See *Patterson* v. *Newspaper and Mail Deliverers Union,* Slip Opinion, 2415, (Docket No. 74-2548, 2d Cir., March 20, 1975); *Rios* v. *Enterprise Assn. Steam Fitters Loc. 638 of U.A.,* 501 F. 2d 622, 631-632 (2d Cir., 1974); *Vulcan S. ciety of New York City Fire Dept., Inc.* v. *Civil Service Commission,* 490 F. 2d 387, 399 (2d Cir., 1973); *Bridgeport Guardians Inc.* v. *Members of Bridgeport C.S. Commission,* 482 F. 2d 1333, 1340-1341 (2d Cir., 1973); *United States* v. *Bethlehem Steel Corporation,* 446 F. 2d 652, 661 (2d Cir., 1971).

The procedures for excessing supervisors established by Judge TYLER in the order of February 7, 1975, represent the most drastic form of relief, are unnecessary to adequately protect the plaintiffs' rights and result in very severe administrative problems for the community school districts and the Board of Education.

The procedures established in the orders appealed from in this case require any community school board intending to excess supervisors to select the supervisors to be ex-

cessed in such a manner that the racial percentage of black, Puerto Rican and all other supervisors in the district before the excessing is the same as the racial percentage of the three groups after the excessing.

An example will help illustrate the intra-districting procedure and its complexity. District A has 16 supervisors, 4 Puerto Rican, 4 black, and eight others. Four of the schools in the district are required to excess one supervisor each. Of the four supervisors to be excessed, three are black and one is white. Before the community school board can approve the schools' choices of who are to be excessed, it must compare the racial percentages of the people to be excessed to the racial percentages of all the supervisors in the district. Since the percentage of black supervisors actually to be excessed is 75% (3 of 4), which is 50% greater than the percentage of blacks in the district (4 of 16), two blacks will have to be returned to the schools which excessed them, and, in their place, there will have to be substituted two people from the other two groups so that the racial percentages of the excessed supervisors is the same as the racial percentage of all the supervisors in the district.

After the community school board has finally determined which supervisors are to be excessed from the district, the names of the supervisors are forwarded to the Board of Education for inter-districting determinations. The Board will compile a list of the excessed supervisors from all the community school districts in the City of New York. After the compilation of the list, the Board will compare the racial percentages of the three groups of supervisors on the central list with the racial percentages of the three groups of supervisors in the entire City of New York. If the racial percentages of blacks and Puerto Ricans on the central list

of excessed supervisors are higher than the racial percentages of these groups throughout the City, black and Puerto Rican supervisors will be returned to their home community school districts. The districts to which these supervisors are returned will substitute supervisors in the "other" group, who will be excessed from the community school districts to the Board. The excessed supervisors who are placed on the final Board list can then be reassigned to existing vacancies throughout the City.

If any supervisors are required to be excessed from the entire New York City school system, the excessing must be done in such a manner that the racial percentages of the three groups of supervisors in the entire City before the excessing is the same as the racial percentages after excessing.

(2)

Assuming arguendo that the District Court did not err in refusing to apply the rules of seniority to the excessing problem. we believe it was not necessary or appropriate for the Court, to require intra-district, as well as inter-district, racial quotas. These procedures and requirements drastically interfere with the administration of the school system and go far beyond what is required to adequately protect the rights of minority employees. The plaintiffs' rights could have been adequately protected by an inter-district racial quota system which would require the Board of Education, only where it has to excess supervisors out of the *entire* New York City School System (i.e., demotion or discharge), to excess personnel in such a manner as to preserve the same racial percentages of the three groups in the entire city that existed before the excessing.

Had the Court ordered only this more limited remedy, the Board would be the only administrative body involved and it would only be involved in the rare case where a supervisor had to excessed from the entire city school system (90-91). The plaintiffs would be protected, since the only possible substantial injury to their rights would result from the plaintiffs being excessed from the entire city school system. The more limited form of remedy applying a racial quota system would protect them at this stage of the excessing procedure. We recognize that under this more limited form of relief there might be some degree of inconvenience or discomfort imposed upon minority group supervisors, but we believe this would be preferable to the imposition on a wholesale scale of racial quotas—in a situation, where as a practical matter, few if any supervisors face the prospect of losing their jobs or suffering any direct economic injury.

CONCLUSION

The order appealed from should be reversed and the District Court directed to accept the proposed order of the Board of Education submitted to it on January 17, 1975. Failing this, the Court should modify the order of the District Court so as to require only a racial quota to be maintained in inter-district excessing of supervisors from the entire New York City school system.

April 30, 1975.

Respectfully submitted,

W. Bernard Richland,
Corporation Counsel of the City of New York,
Attorney for the Appellants New York City Board of Education and the Chancellor of the Board of Education.

L. Kevin Sheridan,
Leonard Koerner,
Leonard Bernikow,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Stanley Barely being duly sworn, says that on the 30 day of April 1975, he served the annexed appellant Brief upon Elizabeth B. DuBois Esq., the attorney for the plaintiff appellees herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 271 Madison Ave in the Borough of m m, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 30 day of April 1975

Stanley Barr

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Stanley Barelle being duly sworn, says that on the 30 day of April 1975, he served the annexed appellant Brief upon Kaye, Scholer, Fierman, Hays & Handler Esq., the attorney for the Deft Board of Examin herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 425 Park ave in the Borough of m m, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 30 day of April 1975

Stanley Barr

John Calia

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Stanley Barelle being duly sworn, says that on the 30 day of April 1975, he served the annexed appellant Brief upon Rabell & Krueger EsqS the attorney for the Amicus Curiae herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 230 Park ave in the Borough of m m, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 30 day of April 1975

Stanley Barr

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

Form 323-40M-703823(73) 346